

Goodhue v. Catalina Mortgage Company, No. 01-16574

AUG 26 2003

McKEOWN, Circuit Judge, dissenting:

CATHY A. CATTERSON
U.S. COURT OF APPEALS

I agree with the majority's analysis on the choice-of-law issue, breach of contract claim, and the award of attorney's fees. But I respectfully part company as to the remand on the fraud and negligence claims. In my view, the district court correctly granted summary judgment on these claims. We would stretch Arizona law and the facts to an unrecognizable degree were we to decide otherwise.

With respect to the fraud claim, the majority notes that Goodhue's "claims based on representations regarding the ability to 'meet all applicable deadlines' would, like a claim based on a promise to provide a specific loan, need to include allegations that representations were made with a present intent not to perform." I agree. Nonetheless the majority concludes that Goodhue's allegations of fraud were supported by "at least a modicum of evidence—chiefly in the form of sworn representations made in Goodhue's affidavit and [an expert] report" Neither Goodhue's affidavit nor the expert report, however, contain any evidence upon which the district court could conclude that Catalina made promises with the present intent not to perform them. Indeed, one wonders why it would even make sense for Catalina to make such promises without intending to perform them, given that Catalina had no contractual obligation to perform at all within any

particular time frame. As there is no evidence to suggest that Catalina knew it would not fulfill its non-binding promises, summary judgment was proper. And, to the extent that Goodhue takes refuge in "the uncertain status" of his motion to compel, he has failed to establish how the evidence could support his fraud claim, a predicate to avoiding summary judgment. See Fed. R. Civ. Proc. 56(f).

A review of the district court's order reveals that remand would be a fruitless exercise. As the district court correctly found, Goodhue failed to offer evidence to suggest that Catalina knew that its representations were false when made. But the district court also held that any claims based on promises to provide a loan with certain terms are precluded by the statute of frauds. Even if the district court's dismissal of Goodhue's fraud claims was "influenced" by the court's mistaken determination that no contract existed, it is unnecessary to remand Goodhue's fraud claim just so the district court can reaffirm its findings with respect to Goodhue's lack of evidence and the statute of frauds.

Regarding the negligence claim, the majority's effort to sidestep the question of whether a mortgage broker owes a duty of care to a prospective borrower under Arizona law is most unusual. One wonders how the majority can evaluate whether Goodhue's evidence is sufficient to survive summary judgment without first determining what evidence is necessary to satisfy the tort of negligence. In my opinion, reversing the district court and remanding to

determine a legal issue that was central to the appeal just delays the day of reckoning.

Goodhue asserts that Catalina was negligent in performing a variety of tasks related to the loan application process. I agree with Catalina that, “[i]f Catalina owed any of those duties to Goodhue, the duty would have been created by the contract relationship between the parties, not imposed by law. In other words, but for the Loan Application, Catalina would have no duties to Goodhue whatsoever.” Although the distinction between actions arising in contract and actions arising in tort has become increasingly ambiguous, it is clear that “[w]here . . . the duty breached is not imposed by law, but is a duty created by the contractual relationship, and would not exist ‘but for’ the contract, then breach of either express covenants or those necessarily implied from them sounds in contract.” Barmat v. John and Jane Doe Partners A-D, 747 P.2d 1218, 1222 (Ariz. 1987) (explaining distinction between actions arising in tort and actions arising in contract). Here, in the absence of any contract, it is clear that Catalina would not owe any of the alleged duties to Goodhue. Because Goodhue has failed to identify any duties owed to him except those provided in the loan application, Goodhue’s negligence claim fails as a matter of law.

Even if there were such a duty, Goodhue’s claim would fail because, notably, he does not assert that he suffered harm in reliance on Catalina’s advice

in an area where Catalina has “special knowledge” or “under[took] to act as an advisor.” Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co., 682 P.2d 388, 403 (1984). Rather, Goodhue asserts that he was harmed by such things as Catalina’s failure to return his phone calls, by Catalina’s failure to adequately train its staff, by Catalina’s preparation of the contract (the loan application), and by the manner in which Catalina conducted its inspections to determine whether it wished to offer Goodhue a loan with the requested terms. These are merely challenges to Catalina’s business practices, not Catalina’s performance of its duties in an area where it held itself out to the public as possessing special skill or knowledge. Allowing Goodhue to bring a negligence claim based on these assertions would be analogous to allowing a patient to sue a doctor when the waiting time to see the doctor or the time it takes to get an appointment exceeds some industry goal, even in the absence of a breach of professional duty.

For these reasons, I respectfully dissent. I would affirm the district court.